

IN THE CRIMINAL COURT FOR DAVIDSON COUNTY, TENNESSEE  
AT NASHVILLE  
DIVISION I

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STATE OF TENNESSEE

V.

PERRY A. MARCH

No: 99-B-1290

**ORDER**

This cause to be heard on November 16, 2005, upon the motion of the defendant to dismiss the indictment against him, pursuant to the Sixth and Fourteenth Amendments to the United States Constitution, Article 1 Sections 8 and 9 of the Tennessee Constitution and Rule 48(b) of the Tennessee Rules of Criminal Procedure. The defendant is charged in 99-B-1290 with Theft of Property over \$10,000 but less than \$60,000 which is a violation of Tenn. Code Ann. §39-14-103. At the hearing the Court heard proof from Collier Miller and Michaela Matthews. Following the hearing, the Court took the matter under advisement and has consolidated its findings into this written memorandum. After considering the arguments put forth by the parties and the relevant Tennessee authorities, the Court finds that the defendant's due process rights and the right to a speedy trial have not been violated and his motions to dismiss should be denied.

The Court heard testimony from Collier Miller, a police captain with the Metropolitan Nashville Police Department who works in the fugitive division. Mr. Miller testified that the fugitive office received a copy of the indictment and capias on June 21, 2000. On October 10, 2002, the defendant's name was entered into NCIC at the request of the district attorney's office. Mr. Miller testified that an NCIC search would help other states run names for outstanding warrants, but not other countries. On May 10, 2004, the warrant was valid as entered into the computer system and a second case<sup>1</sup> was added. Mr. Miller testified that no attempts to serve the capias were made until their office was notified that the defendant was in custody in Los Angeles, California on August 4, 2005. No efforts were made because the district attorney's office had not given them any instructions to serve the capias. The defendant's file

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<sup>1</sup>Case number 2004-D-3113 (Second Degree Murder allegation)

was kept in a safe pursuant to instructions by the district attorney's office.

The Court heard testimony from Michaela Matthews, an assistant district attorney with the Davidson County District Attorney's Office. Ms. Matthews testified that this case was investigated by her office, fraud division, rather than by the police department due to the type of case that it was, a theft from an employer. According to Ms. Matthews, the decision to seek an indictment in this case in May 1999, was due to the fact that it took some time to investigate the case and to wait until all depositions in the corresponding civil case had been concluded to see if there was enough evidence to indict. She testified that the initial referral was made to the district attorney's office in 1997. The civil case depositions of pertinent witnesses were not concluded until November of 1998. Ms. Matthews testified that her office received additional requested information about the case in March of 1999 and the case was presented shortly thereafter to the Grand Jury. Ms. Matthews testified that the decision to indict had nothing to do with where the defendant was living. Also, Ms. Matthews testified that her office had knowledge that the defendant was living in Illinois when the capias for the indictment was being prepared, but moved to Mexico before it was presented to the Grand Jury.<sup>2</sup> Ms. Matthews further testified that the fugitive office was not told to enter the capias into the system until they had knowledge that the defendant was back in the United States. Ms. Matthews further testified that no attempt to enter into international extradition was sought as it is very expensive and would be unusual in a theft case. Ms. Matthews denies the decision to wait and serve the indictment had anything to do with gaining a tactical advantage in his murder case.<sup>3</sup> Ms. Matthews also testified that all indictments that are presented directly to the Grand Jury are sealed and kept secret.

The central issues before the Court is whether the defendant's due process rights and the right to a speedy trial have been violated. Specifically, the defendant contends that the State has engaged in an excessive and unreasonable delay in prosecuting this case and the delay has resulted in a denial of the defendant's due process rights and the right to a speedy trial under the Fifth, Sixth and Fourteenth

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<sup>2</sup>The capias was admitted as an exhibit to this hearing and the initial address of the defendant is Illinois but has been marked through with a line and the subsequent address is in Mexico. Ms. Matthews testified that these markings are in her handwriting.

<sup>3</sup>Case number 2004-D-3113 indictment was returned December 8, 2004.

Amendments to the Constitution of the United States and Article I § 8 and 9 of the Tennessee Constitution and under Rule 48(b) of the Tennessee Rules of Criminal Procedure.

The Court notes that there is a two part analysis in this case. The first is whether the defendant's Fifth and/or Fourteenth Amendment Due Process rights have been violated when the State had information regarding the theft in 1997 and did not seek an indictment until June of 1999. The second analysis is whether the defendant's Sixth Amendment rights were violated when the indictment was returned on June 4, 1999 and was not served until August 17, 2005.

The Court will first address the due process issue in regards to the "pre-indictment" time period. Our supreme court adopted the test devised by the United States Supreme Court in *United States v. Marion*, 404 U.S. 307, 313, 92 S.Ct. 455, 459-463 (1971) in *State v. Baker*, 614 S.W.2d 352 (Tenn. 1981). The *Marion* Court formulated the following test:

(T)he Due Process Clause of the Fifth Amendment would require dismissal of the indictment if it were shown at trial that the pre-indictment delay in this case caused substantial prejudice to appellee's right to a fair trial that the delay was an intentional device to gain tactical advantage over the accused.

*Marion*, 404 U.S. at 324, 92 S.Ct. at 465. A recent formulation of the test requires that the accused prove that (1) there was a delay, (2) the accused sustained actual prejudice as a direct and proximate result of the delay, and (3) the state caused the delay in order to gain tactical advantage over or to harass the accused. *State v. Dykes*, 803 S.W.2d 250, 255 (Tenn. Crim. App. 1990).

In *State v. Gray*, 917 S.W.2d 668 (Tenn. 1996), the Tennessee Supreme Court distinguished between "pre-indictment" delay and "pre-accusatorial delay" in a due process case. *Id.* at 671-673. A "pre-indictment" delay occurs when the state knows that an offense has been committed but delays in bringing charges against the accused. *Id.* at 671. A "pre-accusatorial delay" occurs between the commission of the offense and the commencement of formal proceedings in a case which the state was not aware that the defendant had committed an offense. *Id.* The *Gray* court held that the three-pronged test in *Dykes* applied only to those cases in which the state had knowledge of the offense.

The facts in this case indicate that the *Dykes* factors are applicable to this case. Without question, the state had knowledge of the defendant's alleged theft. The testimony at the hearing demonstrates that a delay did occur. The State became aware of the theft allegation in January of 1997. The case was not



referred to the Grand Jury until June of 1999. Although the state's delay is lengthy, the defendant has not carried his burden of demonstrating that the delay resulted in actual prejudice and that the state caused the delay to gain tactical advantage or to harass him.

In determining whether a delay has violated due process, the most critical factor is the prejudice to the accused. *State v. Webb*, 1997 WL 80971 \*7 (Tenn. Crim. App. at Jackson, February 27, 1997). The Court cannot say that the delay hampered the defendant in the presentation of his defense. The defendant alleges that evidence has been lost. Specifically, the defense attorney alleges that the defendant has not maintained his records from when he was employed at the law firm he has been accused of stealing money from. However, the Court had heard no evidence to establish this allegation and therefore can not consider it. Even so, there was testimony that there was a civil case ongoing during 1998 involving the same issues in this case. During the pendency of the civil case, numerous depositions were taken, including that of the defendant. Therefore, the defendant had notice then that he was being accused of stealing money from the law firm and/or its clients. The Court is of the opinion that there has been no proof of prejudice that was the "direct and proximate result of the delay." *Dykes*, 803 S.W.2d at 256. Absent any proof of prejudice, no further analysis is required. *State v. Baker*, 614 S.W.2d 352, 353-354 (Tenn. 1981). However, the Court would note that there is no evidence the delay in this case was the result of anything other than the state ensuring they had enough evidence to present the case to the Grand Jury. The defendant implied to General Matthews that she must have been waiting to attempt to indict the defendant *after* he relocated to Mexico. There was no proof of this theory, and in fact, the evidence was to the contrary. Therefore, the Court is of the opinion that the due process considerations do not require a dismissal of the indictment due to the "pre-indictment" delay.

The Court will now address the second issue in this case, whether the defendant's Sixth Amendment right to a speedy trial was violated. The right to a speedy trial is, of course, constitutionally based. Rule 48 of the Tennessee Rules of Criminal Procedure provides as follows: "If there is unnecessary delay in presenting the charge to a grand jury against a defendant who has been held to answer to the trial court, or if there is unnecessary delay in bringing a defendant to trial, the court may dismiss the indictment, presentment, information or complaint." Tenn. R. Crim. P. 48(b); *see also* Tenn. Code Ann. § 40-14-101.

In *State v. Bishop*, 493 S.W.2d 81 (Tenn. 1973), our supreme court adopted a four-factor

analysis for determining whether one has been denied his entitlement to a speedy trial. Adopting a test first established in *Barker v. Wingo*, 407 U.S. 514 (1972), our high court created a balancing test based upon the following factors: (1) the length of the delay; (2) the reason for the delay; (3) whether the defendant asserted a claim to his right; and (4) whether the defendant was prejudiced by the delay. *Bishop*, 493 S.W.2d at 84.

The length of the delay is a triggering mechanism. Until there is some delay which is presumptively prejudicial, characterized in some federal and state cases as being from one to two years, there is no necessity for inquiry into the other factors. *Barker*, 407 U.S. at 530. Some courts have held that "a two-year delay is not inordinately long." *State v. Thomas*, 818 S.W.2d 350, 363 (Tenn. Crim. App. 1991). Other courts, however, have found that a delay of one year or longer "marks the point at which courts deem the delay unreasonable enough to trigger the *Barker* inquiry." *Doggett v. United States*, 505 U.S. 647, 652 (1992). Because there was more than a one-year delay from when the indictment was returned until he was served with the capias for the sealed indictment, the Court must consider the other factors.

The second *Barker* factor, the reason for the delay, generally falls into four categories: (1) intentional delay by the state to gain a tactical advantage or harass the defendant; (2) bureaucratic negligence; (3) delay necessary to effectively prosecute the case; and (4) delay caused by or acquiesced in by the defendant. *State v. Wood*, 924 S.W.2d 342, 346-47 (Tenn. 1996). The defendant maintains that sub-factor one is applicable in this case. The State maintains that sub-factor four is applicable in this case. The Court finds that sub-factor three is not applicable in this case. The State offered proof as to why no attempts to contact the defendant were made. That reason being that by the time the indictment was presented to the Grand Jury in 1999, the defendant had already relocated to Mexico. Ms. Matthews testified that engaging in international extradition proceedings are very expensive and highly unusual in a theft case. Therefore, there has been no proof of an intentional delay by the state to gain a tactical advantage or harass the defendant. Further, the defendant can be said to have acquiesced in the delay. By removing himself from the jurisdiction of the United States, he caused the delay in having the indictment served on him. Obviously, the defendant would not have known that an indictment had been returned but the State can not be faulted by the defendant's voluntary withdrawal from the country and thus making more difficult

the service of the indictment. As soon as he was back in the United States, he was served with a Governor's warrant and extradited to Tennessee for prosecution.

The State sought to obtain a sealed indictment against the defendant, and one was returned on June 4, 1999. This was not served upon the defendant until August 17, 2005. The Court finds that factor two, which is bureaucratic negligence, should be weighed against the State. Such negligent delay must be weighed in the defendant's favor, although not given the same weight or consideration as an intentional or deliberate delay purposely caused for improper purposes. *See State v. Wood*, 924 S.W.2d 342, 347 (Tenn. 1996). Within this factor however is the fact that no proof has been offered that the State could have extradited the defendant back to this state from Mexico on a theft charge.

The third factor is the timing of the defendant's assertion of his speedy trial right. Of course, the defendant is under no duty to bring himself to trial. Consequently, the absence of a demand for a speedy trial does not amount to a waiver of the issue. *Bishop*, 493 S.W.2d at 84. Nonetheless, the timeliness of the demand is a factor to be considered when determining whether the defendant has been denied his right to a speedy trial. *Id.* Here, the defendant filed a motion on November 4, 2005 asserting his speedy trial right after the capias for the sealed indictment was served on him on August 17, 2005. The Court finds that the defendant has timely asserted his right to a speedy trial and this factor should be weighed in favor of the defendant.

The fourth factor, whether the defendant has suffered prejudice by the delay, has been deemed the most important factor by the appellate courts. *State v. Vance*, 888 S.W.2d 776, 778 (Tenn. Crim. App. 1994). Prejudice, the most important of the considerations, is assessed in light of three interests to the defendant: (1) to prevent oppressive pretrial incarceration; (2) to minimize the anxiety and concern of the accused; and (3) to limit the possibility that the defense will be impaired. *Id.* at 532. "Serious crimes are expected to take longer than 'ordinary street crime [s].'" *State v. Thomas*, 818 S.W.2d 350, 362 (Tenn.Crim.App.1991) (quoting *Barker*, 407 U.S. at 531).

The Court finds that sub-factors one and two are not applicable in the case before the Court. The defendant has not offered any proof as to sub-factor three other than counsel's statement that the defendant has not maintained his records. However, as stated previously in this order, the Court can not consider what has not been presented in the way of proof.

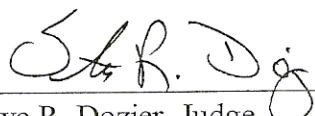
The court would have to assume that the primary factor impairing the defendant's ability to defend himself is the delay itself. However, the defendant has offered no proof that the defense will be impaired due to the delay. The Court finds that this is not sufficient to establish prejudice.

Based on the proof put on at the hearing, this Court is not convinced that the defendant has suffered any prejudice as a result of the delay in this case. Overall, the *Barker* factors weigh favorably for the state. The only proof the defense offered regarding prejudice is the length of the delay alone and statements of counsel.

In reviewing the four factors set forth in *Barker* and adopted in *Bishop*, the Court finds that the defendant's Sixth Amendment right to a speedy trial has not been violated. Therefore, based on the foregoing analysis and the entire record before this Court, the defendant's motion to dismiss pursuant to Tenn. R. Crim. P. 48(b) is denied.

In conclusion, the Court finds that the due process and speedy trial considerations do not require a dismissal of the indictment. Therefore, the defendant's motions to dismiss the indictment are *denied*.

Entered this 6<sup>th</sup> day of December 2005.

  
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Steve R. Dozier, Judge  
Criminal Court, Division I

cc: Ed Fowlkes  
Amy Eisenbeck